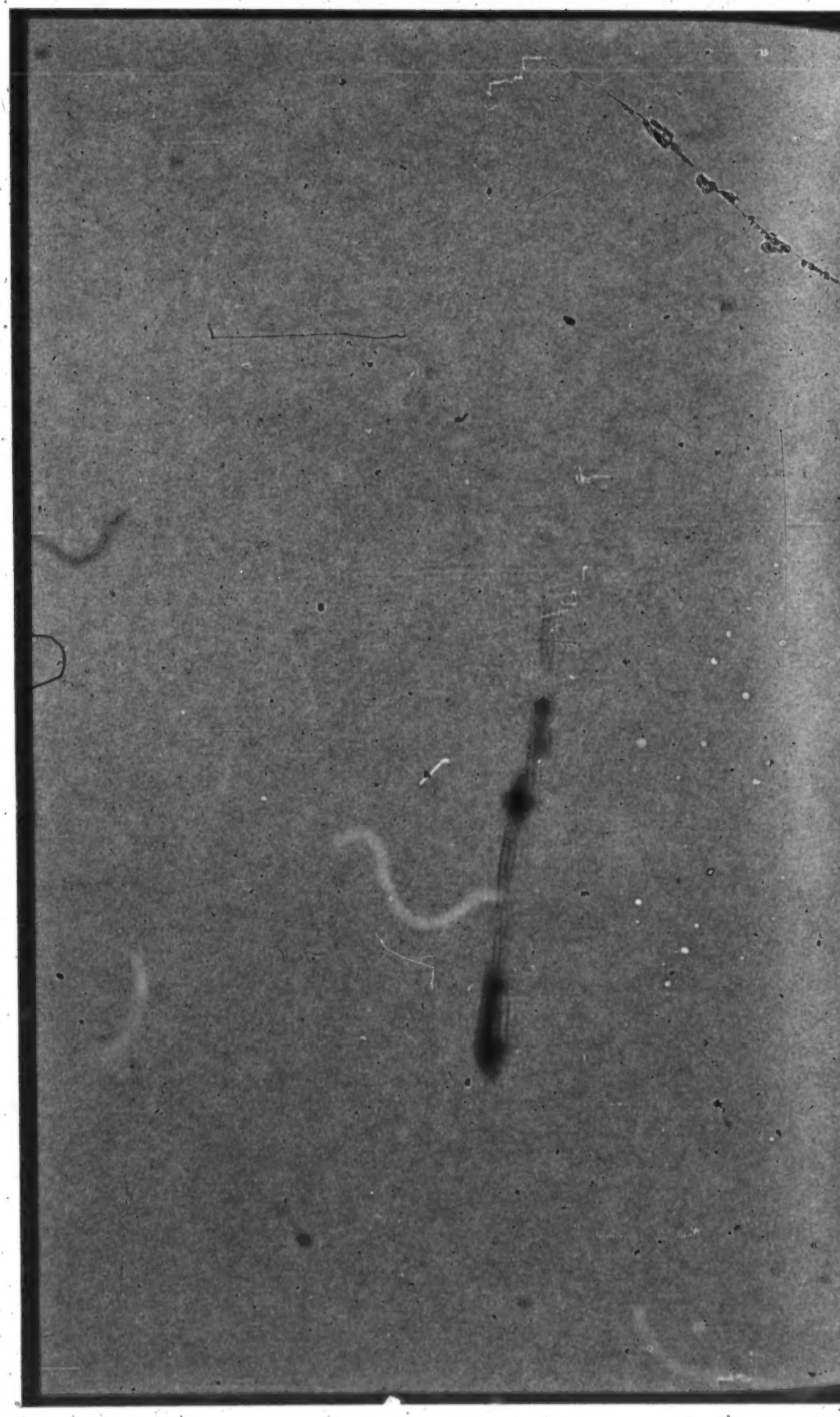

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1930.

No. 183.

STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD AND PHILIP ZOERCHER, AS MEMBERS OF STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; JAMES M. OGDEN, ATTORNEY GENERAL OF THE STATE OF INDIANA, DEFENDANTS - - - - - Appellants

vs.

LAFAYETTE A. JACKSON, PLAINTIFF - - Appellee

BRIEF FOR STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JAMES SHOWALTER, PLINY H. WOLFARD AND PHILIP ZOERCHER, AS MEMBERS OF STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA; JAMES M. OGDEN, ATTORNEY GENERAL OF THE STATE OF INDIANA, DEFENDANTS - APPELLANTS.

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FT. WAYNE PTG. CO. FT. WAYNE, IND.

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(Footnote) *For full text see appendix 54
**For full text see appendix 61
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I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court is reported in 38 Fed. Rep. (2d Series) 652, the same being the opinion in No. 1188 in equity in the District Court for the Southern District of Indiana, Indianapolis Division, rendered February 1, 1930. The opinion is copied beginning on page 51 of the printed Transcript of Record.

II.

STATEMENT OF THE CASE.

This case was begun in the court below by the appellee by filing his Bill of Complaint in Equity, (pp. 1-16) seeking relief by injunction against the enforcement by the appellants of Chapter 207 of the Acts of the General Assembly of the State of Indiana enacted at its 1929 session, on the ground that said Act is unconstitutional. For the convenience of the Court the Act in its entirety is set out in full in the appendix.

The Act was assailed upon four separate grounds as follows:

It was claimed—

First. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of his property without due process of law and denies to the plaintiff the equal protection of the laws. (p. 11).

Second. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by said Fourteenth Amendment. (p. 13).

Third. That said act is invalid because it violates section 23 of article 1 of the Bill of Rights of the Constitution of Indiana (p. 13).

Fourth. That said act violates section 1 of article 10 of the Indiana Constitution. (p. 14).

It was claimed upon the other hand that the act does not violate any of the constitutional provisions, State or Federal, above enumerated; that it is justified as a police measure as well as a revenue measure and that the classification provided in section 5 of the act is reasonable and not open to the charge of unconstitutional discrimination.

Section 5 of the act is as follows:

"Sec. 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store." (pp. 6-7).

The claim of validity of said legislation was first presented by a motion to dismiss the Bill of Complaint (pp. 17-32) which was overruled. (p. 32). A temporary injunction issued. (pp. 32-35). Issues were joined by the filing of an answer. (pp. 35-50). Evidence was heard by a three-judge court and on February 15, 1930, a final decree was entered perpetually enjoining the appellants from enforcing said Chapter 207 of the Acts of the General Assembly of the State of Indiana for the year 1929 and adjudging said act to be invalid and void as violative of the Constitution of the State of Indiana and of the Constitution of the United States. (pp. 65-66).

THE EVIDENCE.

A large mass of evidence was introduced upon the question of the desirability of the "chain store" method of distribution from the economic viewpoint, much of which is of no relevance to the question under consideration, and the net result of which is that there is a difference of opinion on the subject. (p. 115).

The Growth of the Chain Store.

It should be noted as bearing upon the question that the Atlantic and Pacific Tea Company, the largest and oldest of the "chains" in the United States, was founded not many years after the Civil War, although at that time it was hardly comparable with the present day chain system of food distribution. It began in 1890 to emerge into something resembling its present retail system. (p. 84). The A. & P. Company now owns the entire capital stock of the Great Atlantic and Pacific Tea Company of Arizona; it

also controls the Great Atlantic & Pacific Tea Company of New Jersey through ownership of its entire capital stock. (pp. 87-88). The witness Lyons stated that he believed said company owns the entire capital stock of the Great Atlantic & Pacific Tea Company, Ltd., possibly, the Great American Tea Company and the American Coffee Corporation and also the following companies: Atlantic Warehouses, Incorporated, White House Coffee Company, Incorporated, Yukon Club Company, the Nalcut Coffee Company and the Packers Supply Company. (p. 88). The Kroger Grocery & Baking Company is the second largest grocery chain in the United States, operating between 5,500 and 6,000 stores. It owns bakeries and warehouses located in the different principal cities throughout the United States and owns and controls packing houses. (p. 88). It acquired the Thrift Groceries, Incorporated, the Childs Grocery Company of Indianapolis, formerly having seventy stores, the Hoosier Stores of Ft. Wayne, Indiana, operating seventy-three stores and the Foltz Grocery & Baking Company operating approximately ninety-three stores. These were acquired in approximately 1928. Kroger also acquired the Universal Grocery Company of Wisconsin, the Highland Baking Company and Piggly-Wiggly. The Illinois States Company, with approximately one hundred and fifty stores, is now a part of the Kroger interests, as is also the Memphis Piggly-Wiggly Company with sixty stores and Cox Stores, Incorporated, with a group of eighty-one stores. In 1928 Kroger acquired the entire capital stock of the Consumers Sanitary Coffee and Grocery Stores, operating three hundred stores in Chicago, and the Piggly-Wiggly Corporation. (p. 88).

Chain stores have been operated in small rural communities for the past ten years. They were originally largely confined to the big cities where the chain store development has more than doubled. It probably has quadrupled in the last ten years. Dr. P. H. Nystrom, professor of marketing in Columbia University, states that "up to 1927 chain stores had developed rapidly in the larger cities, Cleveland, Boston, Chicago, Los Angeles, Philadelphia, New York, and several other cities. More than half of all products sold through retail stores passed to the consumer through chain stores." (p. 111). There is no government survey of the situation except in eleven cities, which survey was made late in 1927 by the United States Department of Commerce and did not include any Indiana cities. This government survey showed that on the average about forty-four per cent of foodstuffs was sold through chains and in some instances more than fifty per cent of the foodstuffs in certain cities was retailed through chains. This survey would show an increase in the total sales and the percentage of trade increasing in chain stores sales. (pp. 83-84).

Generally speaking, chain stores may be divided into two types or groups. One group is represented by "shopping merchandise" and the other by "convenience merchandise." The "shopping merchandise" group is represented by such stores as Woolworth and Kresge, which usually have one central store located in a downtown shopping district and sell goods which the economist describes as "shopping merchandise" for which the purchaser will go to a central area in order to buy. The other class, including particularly food items, constitutes the "convenience mer-

chandise'' where the housewife demands a convenient location of the store, accessible in a neighborhood sense. (pp. 72-73).

Differences in the operation of a single store or unit *in a chain group* with single ownership and management and the operation of the single store *outside of a chain group* has resulted in certain clearly defined advantages to the single store in a chain group, namely:

Advantage of the Chain Store in Buying.

It has the advantage of quantity buying, making it possible to obtain goods at lower costs. This does not necessarily mean that the manufacturer is intimidated to give this lower price. It means that mass distribution makes possible, for the manufacturer, mass production which in turn lowers his unit costs and therefore, it may be mutually advantageous to the chain store and the manufacturer. This becomes possible because of the practice of the chain store to seek the source of supply—which is the producer. (pp. 121-122).

It has the advantage of underbuying by virtue of its large supply of capital, enabling cash purchases and resultant discounts. (p. 122).

It has the advantage of skill in buying. That is each store in a chain group has the advantage of highly trained and high salaried buyers the cost of which may be distributed among the entire group, thus giving each store the advantage of a highly trained management in buying at a minimum cost. (pp. 122 and 125).

It eliminates the wholesaler and performs the function of its own warehousing. (p. 122).

Advantage of the Chain Store in Large Supply of Capital.

The advantages that come from the control of an abundant supply of capital are these:

The chain can make its expansions as desired without waiting for the accumulation of sufficient earnings. It is possible to erect a warehouse where needed. It is possible to purchase smaller chains; to conduct extensive advertising campaigns; to employ the best merchandising ability and to purchase in large quantities for cash. (pp. 122-123).

Advantage of the Chain Store in Sales Promotion.

This includes advertising which is usually prepared at headquarters by skilled and expert executives, the cost of which can be distributed over all units or stores using it instead of the one store in the case of the independent store. (pp. 124 and 135).

Advantage of the Chain Store in Management.

The independent retailer depends upon the ability of the owner or owners. In the case of the chain store there is the efficient merchandising ability of a group of experts whose combined intelligence and ability constitute a more powerful force than the average independent retailer can provide, the cost of which to the single unit of the chain store group is small when distributed among all the units of the group. (p. 125).

S. S. Kresge Company Graph.

This graph (side folio 193) illustrates the percentage of increase in stores, sales and profits of said company for the period from 1909 to 1927 and shows an increase during said period in stores of 935 per cent, in sales of 2515 per cent, in profits of 5097 per cent.

The Chain Store in Civic Activities.

It was conceded that the man who both lives and has his capital invested in a community takes a greater interest in community activities than one who does not. (p. 134).

III.

SPECIFICATION OF ERRORS.

1. The District Court of the United States for the Southern District of Indiana, (Indianapolis Division) erred in overruling the appellants' (defendants below) motion to dismiss the bill of complaint.

2. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that the classification as contained in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is not reasonable and does not rest upon a ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

3. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that under the evidence in the case there are many persons and firms in Indiana doing a business similar to that of the plaintiff and having but one store with a much larger investment and a much larger gross income, who under Section 5 of Chapter 207 of the Acts of the General Assembly of Indiana of 1929 will be required to pay only three dollars annually as against $5,443.00 annually required to be paid by the plaintiff on account of his two hundred and twenty-five stores.

4. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that all persons engaged in the operation of one or more stores of mercantile establishments within the State of Indiana belong to the same class for occupation tax purposes as the plaintiff and should pay the same license fee regardless of the number of stores owned and operated by them and that any other classification is arbitrary and in violation of the constitutional rights of the plaintiff.

5. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that there is no real and substantial difference within the law granting to the state legislature the authority to classify occupations for the purpose of taxation between the person who reaches his trade through the establishment of more than one store located in various parts of a community and operated under the same general management, supervision and control, and the person who owns but one store and reaches his trade by means of delivery or by requiring his trade to call at the one store so owned by him.

6. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that a classification for the purpose of imposing an occupation tax upon the basis of number of stores operated under the same general management, supervision and control as provided in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929, if enforced will deny the owner

of more than one store of the equal protection of the law as guaranteed by the Constitution of the United States and will deprive him of his rights under the Constitution of the State of Indiana.

7. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is void and in violation of the Constitution of the United States and of the State of Indiana.

8. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in its decree in granting and issuing the injunction herein.

IV.

SUMMARY OF THE ARGUMENT.

A. The District Court of the United States for the Southern District of Indiana (Indianapolis Division), erred in holding and deciding that Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 is void and in violation of the Constitution of the United States and of the State of Indiana.

A-1. This erroneous holding was predicated upon the erroneous conclusion of the court that the classification as contained in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana, *supra*, is not reasonable and does not rest upon a ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Point 1. The taxing power of the state is one of the highest attributes of sovereignty, essential to its continued existence, and may be exercised without limitation on all property, trades and business carried on within its boundaries unless prohibited by the state or federal Constitution.

Railroad Company v. Peniston, 85 U. S. 5, at page 29;

Royall v. Virginia, 116 U. S. 592, at p. 597.

Point 2. In the exercise of its taxing power, the state, in the discretion of its legislature, may levy a privilege or occupation tax on *all occupations or business*, or it may *select* for taxation certain classes and leave the *others untaxed*.

Armour Packing Co. v. Lacy, 200 U. S. 226, at page 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114, at pages 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at page 94;

Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter 188, at page 189.

Point 3. In cases in which the legislature selects certain classes for taxation, the classes so selected may be further subdivided according to certain differences without violating the *due process* and *equal protection* provisions of the Fourteenth Amendment to the Constitution of the United States, if the subdivisions are reasonable.

Cooley on Taxation (4th ed.), Secs. 349-350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Michigan Railroad Tax Cases, 138 Fed. 223, at p. 241;
Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112.

Point 4. In determining whether a classification for an occupation tax is discriminating, the motives or special reasons actuating the legislature is of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question, Does the burden fall alike upon all who are in substantially the same situation?

Cooley on Taxation (4th ed.), Sec. 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, at p. 293;
Dane v. Jackson, 256 U. S. 589, at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322, at pp. 329-331;
McLean v. Arkansas, 211 U. S. 539, at p. 547.
Hart Refineries v. Harmon, Treas., supra.

Point 5. The imposition of an occupation tax in different amounts upon different occupations is not a denial of *due process* or *equal protection* of the laws.

Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179.

Point 6. A state does not deny *equal protection* of the laws by adjusting its revenue laws so as to favor certain industries or industries carried on in a specified manner.

Quong Wing v. Kirkendall, etc., 223 U. S. 59, at pp. 62-63;

Metropolis Theatre Co. v. Chicago, 228 U. S. 61, at p. 69.

Point 7. The classification of occupations for taxation provided by Chapter 207 of the Acts of the General Assembly of the State of Indiana of the year 1929 selects *all stores* in which goods, wares or merchandise of any kind are sold either at retail or wholesale. Such a selection is clearly not open to objection. The fact that everyone owning and operating *one store* is required to pay the *same tax irrespective of amount of business done* would not operate to strike down the law. The tax is charged for the privilege of operating one store, and so long as the tax provisions of the act operate upon all such owners and operators alike, as is the case with the act under consideration, it is not open to the objection that it violates the Fourteenth Amendment.

Sec. 1 of Chap. 207, Acts of General Assembly of Indiana, 1929;

Sec. 5 of Chap. 207, Acts of General Assembly of Indiana, 1929;

Railroad Company v. Peniston, 85 U. S. 5 at p. 29;

Armour Packing Co. v. Lacy, 200 U. S. 226 at p. 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114 pp. 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232 at p. 237;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at p. 94;
Hart Refineries v. Harmon, Treas., 49 Sup. Ct. Rep. 188 at p. 189;
Cooley on Taxation, (4th ed.), Secs. 349-350;
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Great Atlantic & Pacific Tea Co. v. Maxwell, Commissioner, etc., (N. C.) 154 S. E. 838;
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Michigan Central R. R. Co. v. Powers, 201 U. S. 245 at p. 293;
Dane v. Jackson, 256 U. S. 589 at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. at pp. 329-331.

Point 8. The first store of any group under the classification made by the act in question is required to pay the same tax; the second, third, fourth and fifth stores of any group are likewise required to pay the same tax at the same numbers in any other group large or small; the sixth, seventh, eighth, ninth and tenth stores of any group are likewise required to pay the same tax as the same numbers in any other group large or small and so on. In other words, every person in the same situation with resepct to number of stores operated at different locations under the same management is required to pay exactly the same tax and the fact that a given person may operate numerous stores does not increase the tax on the first store, or on any of the remainder of the second group and so on. The

tax provision operates uniformly as to each classification and of this there can be no doubt. The burden falls alike upon all in the same situation."

Cooley on Taxation (4th ed.), Sec. 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114 at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172 at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245 at p. 293;
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Citizens Telephone Co. v. Fuller, 229 U. S. 322 at p. 331;
Great Atlantic & Pacific Tea Co., et al. vs. Maxwell, Com., etc. (N. C.) 154 S. E. 838.

Note: *See appendix, page 57, for method of classification.

A-2. The erroneous decision of the court below holding Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 to be void and in violation of the Constitution of the United States and of the State of Indiana is further predicated upon the erroneous conclusion that there is no real and substantial difference within the law granting to the state legislature the authority to classify occupation for the purpose of taxation between the person who reaches his trade through the establishment of more than one store located in various parts of a community and operated under the same general management, supervision and control, and the person who owns but one store and reaches his trade by means of delivery or by requiring his trade to call at the one store so owned by him.

Point 9. The classification is not arbitrary. The plaintiff below has a reason for desiring to divide his capital of $200,000, into 225 stores at different locations in preference to concentrating at one location, thus limiting the number of single proprietorships. And under the authorities the state has a perfect right to promote individual proprietorship of single stores by adjusting its revenue laws so as to favor them.

Quong Wing v. Kirkendall, etc., 223 U. S. 59 at pp. 62-63;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61 at p. 69;
Alaska Fish Co. v. Smith, 255 U. S. 44;
W. W. Cargill v. Minnesota, 180 U. S. 452;
City of Los Angeles v. Los Angeles Ind. Gas Co., 93 Pac. 1006;
Singer Sewing Machine Co. v. Brickwell, 233 U. S. 304;
American Sugar Refining Co. v. Louisiana, 179 U. S. 89;
New York v. Latrobe, 49 Sup. Ct. Rep. 377;
Great Atlantic & Pacific Tea Co., et al. v. Maxwell, Com., (N. C.) 154 S. E. 838.

Point 10. The classification is not in violation of the due *process* and *equal protection* provisions of the Fourteenth Amendment to the United States Constitution.

Quong Wing v. Kirkendall, etc., supra;
Metropolis Theatre Co. v. Chicago, supra;
Southwestern Oil Co. v. Texas, supra;
Oliver Iron Co. v. Lord, supra.

Point 11. The evidence as set out in the statement of the case clearly shows a real and substantial difference between merchants who exercise the privilege of carrying on their business in this state by means of two or more stores and those who maintain and operate only one store. The tendency to monopoly by the "chain" groups, especially in food distribution in cities, fully justifies the various sub-classifications.

Point 12. Federal courts exercise great caution in interfering with the collection of revenues of the state or their municipal and public agencies.

Union Pac. R. Co. v. Lincoln County, Fed Cas. No. 14379 (2 Dill. 279);
Graham v. Du Pont, 262 U. S. 234;
Bailey v. George, 259 U. S. 16.

Point 13. If a state deems it advisable and to the best interest of its citizens to discourage a specific business and encourage another class, that is so closely associated with it as to be a part of the former, by placing a heavier license fee on the former and a lighter or no fee at all on the latter, it is valid and not an unjust and unreasonable discrimination or a palpable arbitrary classification.

American Sugar Refining Co. v. Louisiana, 179 U. S. 89;
Quong Wing v. Kirkendall, 223 U. S. 59;
Alaska Fish Co. v. Smith, 255 U. S. 44, 48, 49;
W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 469;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 69;

Ex parte Thornton, 12 Fed. 538, 548;
City of Los Angeles v. Los Angeles Ind. Gas Co., 93 Pac. 1006;
Singer Sewing Machine Co. v. Brickwell, 233 U. S. 304.

Point 14. A classification of occupations for taxation made by the legislature of a state which is not wholly unreasonable and arbitrary, and which is uniform in its operation on all members to which it is *made applicable*, is not violative of the equal protection guaranteed by the Federal Constitution.

Consumers' League v. Colorado, etc., R. Co., 125 Pac. 577;
Chicago, etc., R. Co. v. Arkansas, 219 U. S. 453, 466;
W. W. Cargill Co. v. Minnesota, 180 U. S. 453, 469.

Point 15. The state is sovereign mistress of her own policy in establishing classes for the purpose of raising revenue by taxation and such classification will not be set aside except where there is no rational basis for the classification.

Ex parte Thornton, 12 Fed. 538;
Singer Sewing Mach. Co. v. Brickwell, 233 U. S. 304.

Point 16. The provision of the act in question with reference to the imposition of penalties for its violation does not transgress any constitutional provision. Payment of occupation taxes may be enforced by fine if the law-making body deems it proper.

Cooley on Taxation (4th ed.) Sec 1717;
Rosenbloom v. State, 64 Neb. 342, 57 L. R. A. 922;
Leonard v. Earl, 49 Sup. Ct. Rep. 372.

Point 17. An occupation may be lawful in itself and not subject to prohibition or regulation by the State *under the police power*, and yet may be prohibited in order to compel the taking out of a license for the purpose of raising revenue.

Banta v. City of Chicago, 172 Ill. 204 at p. 219;
Cooley on Taxation (4th ed.) Sec. 1679.

A-3. The erroneous decision of the court below holding Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929 to be void and in violation of the Constitution of the United States and of the State of Indiana is further predicated upon the erroneous conclusion that a classification for the purpose of imposing an occupation tax upon the basis of number of stores operated under the same general management, supervision and control as provided in Section 5 of Chapter 207 of the Acts of the General Assembly of the State of Indiana of 1929, if enforced will deny the owner of more than one store of the equal protection of the law as guaranteed by the Constitution of the United States and will deprive him of his rights under the Constitution of the State of Indiana.

Point 18. The tax imposed by Section 5 of said act operates uniformly upon all within any given class. There is no unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by the Fourteenth Amendment

by the imposition of an occupation tax which operates uniformly upon all within the class to which he belongs.

American Sugar Refining Co. v. Louisiana, 179 U. S. 89 at p. 94;

Armour Packing Co. v. Lacy, 200 U. S. 226, at p. 235;

Southwestern Oil Co. v. Texas, 217 U. S. 114, at pp. 124, 125 and 126;

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;

Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter 188, at p. 189.

Point 19. The act in question does not violate section 23 of article 1 of the Indiana Constitution providing that,

> "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Note: See appendix page 61.

Point 20. In determining questions arising under a state Constitution, the United States courts will follow the decisions of the highest court of such state in interpreting its own Constitution.

Douglas v. Noble, 261 U. S. 165, at p. 168;

United States ex rel v. Madison County, 263 U. S. 718;

Jones v. City of Portland, 245 U. S. 217.

Point 21. The subjects and methods of taxation are legislative matters, and can not be disturbed so long as the method prescribed is applicable alike to all within the prescribed class. Corporations, individuals, wholesale and retail dealers, domestic and foreign corporations may be separately classified and taxed differently, so long as all in the constituted classes are treated alike.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 472 et seq.;
State, ex rel. Lewis, et al. v. Smith, Aud., 158 Ind. 543, at p. 546;
Gafill v. Bracken, Aud., 195 Ind. 551, at p. 560;
State v. Hammond Pkg. Co., 233 U. S. 331.

Point 22. The power to tax is essentially legislative in its character, and it is not required, under the provision of section 23 of article 1 of the Indiana Constitution that there should be such an exact exclusion and inclusion of the subjects of taxation as to meet fully the approval of the judicial mind as to what is reasonable. It is only palpable abuses of the power that the courts assume to overthrow.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 474.

Point 23. The classification for taxation in the act in question is reasonable and the operation of the law is uniform within the designated classes.

Point 24. The act in question does not violate section 1 of article 10 of the Indiana Constitution providing that:

"The General Assembly shall provide by law for a

uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes as may be especially exempted by law."

Note: See appendix page 61.

Point 25. The act in question is not a *property tax* and the above provision of the Constitution of Indiana is wholly inapplicable. The act does not impose a tax on the contents of plaintiff's stores but upon the sale or use of their contents.

Gafill v. Bracken, Aud., 195 Ind. 551, at p. 558;
Bright v. McCullough, 27 Ind. 223;
Thomason v. State, 15 Ind. 449;
Baldwin Tool Co. v. Blue, 240 Fed. 202;
Bradley v. City of Richmond, 227 U. S. 477.

Point 26. The tax is valid under the police power. The "chain store" method of distribution tends toward monopoly and has a definite relation to the general welfare in its tendency toward the destruction of individual ownership of single distribution units. The question as to whether Indiana has acted wisely in seeking to encourage individual ownership of single distribution units is primarily for the legislature and not for the courts.

Quong Wing v. Kirkendall, etc., 223 U. S. 59, at pp. 62-63;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61, at p. 69;
Cooley on Taxation, (4th Ed.), Sec. 350;

Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at p. 94;

Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter, 188, at p. 189.

V.

ARGUMENT.

The action herein is an attack upon the constitutionality of chapter 207 of the Acts of the General Assembly of Indiana for the year 1929. The act is assailed upon four separate grounds as follows:

It is claimed—

First. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of his property without due process of law and denies to the plaintiff the equal protection of the laws.

Second. Said act violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it is an unwarranted abridgement of the rights and privileges guaranteed to the plaintiff by said Fourteenth Amendment.

Third. That said act is invalid because it violates section 23 of article 1 of the Bill of Rights of the Constitution of Indiana.

Fourth. That said act violates section 1 of article 10 of the Indiana Constitution.

While we think the classification made by the act in question may be and is amply justified as a police measure, we are equally confident that it may be sustained upon principle and authority as a revenue measure. If it should be

objected, however, that while partaking of the nature of a police regulation, it is also a revenue measure and partakes of the nature of a privilege tax, that would not be a valid objection to its constitutionality. The revenue obtained on account of the license required by the act is none the less legal because the act performs two functions, one a regulating and the other a revenue function.

Gundling v. Chicago, 177 U. S. 183, at p. 189.

The power of taxation is an incident of sovereignty and is possessed by the government without being expressly conferred by the people. It is a legislative power. As said by Judge Cooley in his work on Taxation (Cooley on Taxation, 3rd Edition, page 9):

> "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or rights. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes."

The authority to tax is distinctly legislative and under our system creating three distinct departments of government and apportioning the power between them, the judiciary is so far excluded from interfering with the legislative function that the legislative department itself does not have the power to delegate its authority to the judic-

iary. The necessity, discretion, policy or motive which may have actuated the legislature in imposing a tax is of no proper concern of the courts. Quoting again from Cooley on Taxation, 3rd Edition, page 46:

> "The legislature must therefore determine all questions of state necessity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. 'The judicial tribunals of the state have no concern with the policy of legislation. That is a matter resting altogether in the discretion of another co-ordinate branch of the government. The judicial power can not legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the state.'"

In the same connection we desire to call the court's attention to the language of Mr. Justice Strong in the case of *Railroad Company v. Peniston*, 85 U. S. 5, quoting from page 29:

> "That the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all *property, trades, business,* and *avocations* existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the federal government,

either expressly or by necessary implication, are propositions that have often been asserted by this court." (Our italics.)

Again on page 30:

"The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State Constitution, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government."

Moreover, as said by the court in *Royall vs. Virginia*, 116 U. S. 592, at page 597:

"The payment required as a preliminary to the license is in the nature and form of a tax, and is due the state which it may demand and exact from everyone of its citizens who either will or must follow some business avocation within its limits, to which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, * * * because it is laid and collected as revenue, and not merely as incident to the general police power of the state."

In considering the legislation under investigation in this case, it is important, therefore, that the extent of legislative power of taxation as above defined be kept in mind.

It is, of course, evident that the legislature of a state is not limited in its exercise of the power of selection of subjects of taxation to a tax on property as such. "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege or occupation or right." A tax such as the one imposed by the act under investigation is not a new method of raising revenue. The method has been adopted and upheld in numerous instances. The right to levy an occupation or privilege tax is no longer open to serious debate; and in the exercise of that right the legislature in the exercise of its discretion may select *all occupations* for taxation or it may select *certain classes* and leave other untaxed.

Thus, in the case of *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, the Constitution of Louisiana *classified* the refiners of sugar *for the purpose of taxation* into (1) those who refine the products of their own plantations and (2) those who engage in a general refining business refining sugars purchased by themselves or put in their hands by others for that purpose and imposing a tax upon the latter class only. The Supreme Court held that such discrimination *did not deny* to persons and corporations doing a general refining business the *equal protection of the laws*.

In the course of the opinion the court said, quoting with approval from *Missouri Railroad Company v. Mackey*, 127 U. S. 205:

> "In *Missouri Railroad Co. v. Mackey*, 127 U. S. 205, it was said that this clause did not forbid special

legislation; 'and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, *if all persons brought under its influence are treated alike under the same conditions.*'" (Our italics.)

The court, in the above case, also quoted with approval from *Bell's Gap Railroad Company v. Pennsylvania,* 134 U. S. 232, from which we desire to quote as follows, beginning near the top of page 237:

> * * * "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. *It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products;* it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes,

especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt *an iron rule of equal taxation*, * * *." (Our italics.)

In the case of *Armour Packing Company v. Lacy*, 200 U. S. 226, the question was upon the constitutionality of a law of the State of North Carolina levying a tax of one hundred dollars for each county in which the business was carried on upon every meat packing house doing business in the state. It was contended by the plaintiff in error among other things (1) that the tax was forbidden by the Fourteenth Amendment to the Constitution of the United States and (2) that singling out meat packing houses is arbitrary and class legislation. One of the points urged in support of the above contentions was that it denied the equal protection of the laws to meat packing establishments by levying the tax upon them and at the same time not levying the tax upon vegetable packing houses. The Supreme Court denied both contentions and in upholding the law in the course of the opinion used the following language, on page 235:

"As we have frequently held, the state has the right to classify occupations and to impose different taxes upon different occupations. Such has been con-

stantly the practice of Congress under the internal revenue laws."

Again on the same page the court, in quoting with approval from *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 562, used the following language:

> "A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings."

The case of *Southwestern Oil Company v. Texas*, 217 U. S. 114, involved the question of the validity of an act of the State of Texas, levying a tax upon individuals, firms, associations, or other persons owning, managing, operating or controlling for profit within the state certain specified kinds of business, including wholesale dealers in coal oil, etc.

The defendant oil company insisted that the statute was inconsistent with the Fourteenth Amendment of the Constitution of the United States because (1) it arbitrarily selected and levied upon wholesale business in coal oil, naphtha, benzine and other mineral oils a tax of from fifty to one hundred times greater than was levied by the state upon wholesale business in other articles (similar to the claim made for the appellee in the present case), and (2) it denies to the defendant the equal protection of the laws in that the penalties for violation by such dealers is greater than in the case of other wholesalers.

Upon the subject of the right of the state to classify occupations for purposes of taxation the court, among other things said, on page 121:

> "It is not questioned that the state may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights. The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the state, in its discretion, to classify occupations for purposes of taxation."

After reviewing the cases the Supreme Court upheld the classification made by the State of Texas in the above case, holding that "the requirement by the state that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation without exacting a similar tax on the occupations of wholesale dealers in other articles can not, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law or to deny him the equal protection of the laws; and that the federal court can not interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it can not be sure as to the precise reasons inducing the state to enact it."

Before leaving the above case we desire to call the court's attention to the following pertinent language on page 126:

"The statute makes no distinction among such wholesale dealers as handle the *particular articles specified in section 9.* The state had the right to classify such dealers separately from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents *of each of those separate classes* on the same plane of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness can not be predicated of it in a court of law. And it can not be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the state to adopt the classification of which the oil company complains we do not certainly know. Nor is it important that we should certainly know. * * *"

Moreover persons of the same class, as said in Cooley on Taxation, 4th edition, section 349, "may be subdivided according to certain differences, provided the subclassification is reasonable and the tax graduated accordingly, or one or more subclasses may be exempted."

The above proposition is aptly illustrated by the case of *Michigan Railroad Tax Cases,* 138 Fed. 223, sustaining a subclassification of railroads for purposes of taxation and providing for a different method for the taxation of railroad property owned by railroad companies from that owned by individual or manufacturing establishments.

Michigan R. R. Tax Cases, 138 Fed. 223, at page 241.

The classification of occupations for taxation purposes may be so made as to favor certain industries or industries carried on in a specified manner.

The case of *Quong Wing v. Kirkendall*, 223 U. S. 59, aptly illustrates the above proposition.

The act assailed imposed a tax upon all persons engaged in the laundry business other than the steam laundry business with a proviso that it should not apply to women so engaged where not more than two women were employed. The Supreme Court upheld the law, using in the course of its opinion the following language, on page 62:

> "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. * * *"

Again on page 63 the court uses the following language:

> "If the state sees fit to encourage steam laundries and discourage hand laundries that is its own affair. And if again it finds a ground of distinction in sex that is not without precedent. * * *"

The case of *Metropolis Theatre Company v. Chicago*, 228 U. S. 61, is likewise in point. The legislation in question in the above case was an ordinance of the city of Chicago imposing a license fee upon places of amusement. The fee was graded according to the price of admission for single seats. If the admission was $1.00 the fee charged was $1,000; if the admission exceeded 50 cents, but was

less than $1.00, the fee was $400 and so on. It was claimed that the classification was arbitrarily discriminatory. The Supreme Court upheld the law and in the course of the opinion used the following language, on page 69:

"Regarding it as a revenue measure, complainants attack it as unreasonable in basing its classification upon the price of admission of a particular theatre and not upon the revenue derived therefrom; and to exhibit the discrimination which is asserted to result, a comparison is made between the seating capacity of complainants' theatres and the number of their performances within given periods and the theatres of others in the same respects and the resulting revenues. But these are accidental circumstances and dependent, as the Supreme Court of the state said, upon the advantages of the particular theatre or choice of its owner, and not determined by the ordinance. *It will immediately occur upon the most casual reflection that the distinction the theatre itself makes is not artificial and must have some relation to the success and ultimate profit of its business.* In other words, there is natural relation between the price of admission and revenue, some advantage certainly that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of governmental action. If the action of government have such a basis it can not be declared to be so palpably arbitrary as to be repugnant to the Fourteenth Amendment. This is the test

of its validity, as we have so many times said. We need not cite the cases. It is enough to say that we have tried, so far as that amendment is concerned, to declare in words, and *the cases illustrate by examples the wide range which legislation has in classifying its objects. To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet to be free from judicial interference.* The problems of government are practical ones and may justify, if they do not require rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercise which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy." (Our italics.)

The basis of classification in the last case cited was the price of an admission. The total amount of sales was not at all controlling; it was the price of a single ticket, which controlled. The court pointed out that the distinction which the theatre itself made was evidently not considered as artificial and must be deemed to have some relation to the success of the business. How different is the case presented here? The appellee evidently does not consider the classification as artificial. The fact that he has divided his capital of $200,000 into 225 stores at different locations in the city of Indianapolis evidences the fact that he considers that method of doing business as having

a relation to the success of his business since otherwise he might combine his capital at one location. The insistence of the appellee upon his right to transact his business in a certain way evidences the fact that he is not transacting it in the same way as if it was all transacted at one location. If the classification which he has made for the purpose of business is not artificial and arbitrary, it is hard to see why it should be thus classed for taxation.

It will be noted that the classification made by the act in question is such as to impose identically the same tax on any given number of stores. The first store, whether a single store or belonging to a group, is always taxed the same. Thus it is with the second, the third, the fourth store, and so on. The act operates uniformly and the classification is reasonable. It is not, we submit, open to the objection that it violates the Fourteenth Amendment to the United States Constitution.

In the case of *Alaska Fish Co. v. Smith*, 255 U. S. 44, the complaint alleged that the tax would prohibit and confiscate the plaintiff's business,—manufacturing fish oil, fertilizer, fish meal and by-products from *herring* in whole or in part, and that it unreasonably discriminated against plaintiff since it levied no tax on producers of fish oil, etc., from *other* fish. The court said on page 48:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for man, or salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a constitution that has known protective tariff 100 years.

Rast v. Daneman & Lewis Co., 240 U. S. 342, 357. Even if the tax should destroy a business it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk."

Again on page 49, the following:

"We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like."

The question of importance in the case at bar is whether the legislature had any reasonable hypothesis for its distinction by reason of the license being graduated on the number of stores operated from one common head.

The fact that each of complainants' stores carries on its shelves the same articles, sells to the same public and in the same way so far as the more or less mechanical part of handling the purchased articles over the counter, ringing up the sales and waiting upon the customers is concerned,—as is the case of the single store owner, is manifestly a surface comparison, as counsel well know, and wholly ignores the fundamental and necessary difference of management; unified control; unified bulk buying with its corresponding advantages; ability to shift stocks of goods and others doubtless better known to complainant as the actuating motive which induces him to carry on his business as he does in preference to carrying it on as one store.

If the State of Indiana in the adjustment of its revenue measures saw fit to discourage the rapid and alarming increase in chain stores which it may have believed tended

toward the destruction of individual ownership of individual stores, as it may well have done under the evidence, it had the right to do so.

Quong Wing v. Kirkendall, supra;
Alaska Fish Co. v. Smith, supra.

The burden, we take it, rests upon the complainant to show the arbitrariness of the classification. If there is no difference, why, we ask, does the complainant desire to split his capital up in the City of Indianapolis into 225 stores, as he says, selling precisely the same articles in precisely the same way. If his counsel dare to answer that question they will tell the court that his reason for so doing first is that he reaches directly a larger portion of the purchasing public in proportion to the number of stores operated by him. If that were as far as the answer went there might be some basis for the argument that each of complainant's stores should rest on the same basis as every other single store. But that is only part of the answer. There would be no reason for reaching a larger proportion of the purchasing public unless he had the goods to sell and no reason for having the goods unless he could reach the larger proportion of the purchasing public. His multiple stores furnish the outlet for bulk purchasing, by which he is enabled to secure a better price. The purchasing power of every dollar is thereby increased and his corresponding profits in competition with single store ownership are enhanced. That may well account for the amazing growth of the chain store enterprise.

If the legislature might reasonably have come to the conclusion that the number of stores operated had some re-

lation to the success and ultimate profit of the business it had the right to make the classification.

Metropolis Theatre Co. v. Chicago, 228 U. S. 61.

Whether the legislation under consideration is wise, or whether the classification was one that meets with the approval of the court are of no concern in this litigation. It was very aptly said in the case of *McLean v. Arkansas*, 211 U. S. 539, 547:

> "The legislature being familiar with the local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy; or that judges may hold views inconsistent with the propriety of the legislation in question, affords no grounds for judicial interference unless the act in question is unmistakably and palpably in excess of legislative power."

A classification based on the number of stores operated is not unwarranted and arbitrary. This class of legislation has consistently been upheld in the State of Indiana. In the case of *Strange v. Board, etc.*, 173 Ind. 640, 644, the Supreme Court held that the classification of cities by their populations was not an unjust discrimination or arbitrary legislation. In the case of *Chandler Coal Co. v. Sams*, 170 Ind. 623, 627, 628, the court held that the classification of coal mines by the number of employes was not class legislation or arbitrary discrimination. The same class of legislation was upheld in *Booth v. Indiana*, 237 U. S. 391, 397. In the case of *Curdts v. South Carolina Tax Comm.*, 131 S. C. 363, affirmed 273 U. S. 669, a tax on the admission to

places of amusement was held not to be invalid as discriminatory because exempting towns of less than 2,000 population and collegiate and public school amusements and swimming pools and where the proceeds inure directly to religious, charitable, education and eleemosynary organizations or to any agricultural or industrial society.

Nor is volume of business controlling. The unreasonableness of a license tax cannot be determined by the extent of business done by a single individual or concern. Can it be said that if complainant had its many stores collected to a single location that his volume of business done in the neighborhood would continue? Does he contend that his business ability, and his experience is equal to the department store? Is he assured of less or more competition? Is he assured that he could secure as competent help and that his employes would manifest the same interest in his business? There are many things that prevent the determination of the unreasonableness of a classification by a comparison of business of a single person or concern. See *Nashville, etc. R. Co. v. City of Attalla*, 118 Ala. 362.

The registration fees charged on account of various professions such as dentists and doctors in this state have never been questioned and yet they bear no relation to the amount of business done. One may do a $25,000 per year business, another a $2,500 per year business, but both pay the same. It is well illustrated in the case of *Los Angeles v. Los Angeles Ind. Gas Co.*, 93 Pac. 1006. There a uniform tax was placed as a license tax on gas companies. There were only two gas companies, one had an investment

of $100,000 with an income of $1,500 monthly, the other had an investment of $3,500,000 and a monthly income of $125,000. The court held a tax of $100 was not invalid, saying:

> "It would probably be fairer to so graduate the license tax, but we can not as a matter of law say the distinction as to the volume of business is of itself evidence of discrimination. Similar differences exist in every case but are never sufficient to invalidate the tax."

The state has a right to impose a fine and imprisonment on the failure of the payment of a license tax. Cooley on Taxation (4th Ed.), sec. 1717.

In case of *Rosenbloom v. State*, 64, Neb. 342, 57 L. R. A. 922, the court had under consideration a law that imposed a penalty of $50.00 per day for failure to procure a peddler's license. The court held that the state had a right to exact the penalty for violation of the regulation and in the course of the opinion, said:

> "A law to provide a system of revenue would be singularly weak and inefficient if it did not make adequate provisions for the collection of taxes. In fact every revenue law does contain such provision. The usual and appropriate method of enforcing payment of a property tax is by the addition of an increased rate of interest, which is in truth a penalty, and by sale of taxed property. But payment of taxes on occupations cannot be enforced in this way, and hence the ordinary, and often the only effective method of com-

pelling payment, is by fine and imprisonment of the person on whom the tax is imposed."

Before closing the discussion upon this branch of the case, we desire to call the court's attention to the case of *Great Atlantic & Pacific Tea Company, et al. v. Maxwell, State Commissioner of Revenue,* decided by the Supreme Court of North Carolina on September 17, 1930, and reported in 154 S. E. at page 838. In that case the question before the court was the constitutionality of Section 162 of Chapter 345 of the Public Laws of North Carolina for the session of 1929. Said Section is as follows:

> "Sec. 162. *Branch or Chain Stores.* Every person firm or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale at retail shall be deemed a branch or chain store operator, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license fifty dollars ($50.00) on each and every such store operated in this State in excess of one."

It appears that this case was very fully argued and many of the larger chain store groups were represented by counsel. In deciding that the above section was constitutional the court entered into an extensive consideration of the principles involved and to which we have already referred, and continued as follows:

"In view of the foregoing well-settled principles of constitutional law, both state and federal, applicable to the question presented for decision by this appeal, we are of opinion that there was no error in the finding and conclusion of the court below that the classification made by the General Assembly of this state, in section 162, Public Laws of North Carolina, Session 1929, of the business of maintaining and operating branch or chain stores as therein defined, exclusively for purposes of taxation, is neither unreasonable nor arbitrary; that there is a real and substantial difference between merchants who exercise the privilege of carrying on their business in this state, by means of two or more stores, and those who maintain and operate only one store, and that this difference appears on the face of the statute, without regard to the findings of fact made by the court; that the imposition of a license tax on one class, without the imposition of a like tax on the other class of merchants, is not an unjust, unreasonable, or arbitrary discrimination between the two classes, for the reason that merchants who are required to obtain licenses, and to pay the tax, have and exercise a more valuable privilege than those who are required to do neither; that, therefore, the statute is not in violation of either the state or the federal Constitution.

"The statute was enacted by the General Assembly in the exercise of a wide and comprehensive discretion vested in it as the legislative department of the state government, and is in pursuance of the well-settled

policy of the state with respect to its system of taxation. The classification in accordance with which the plaintiffs were required to pay the license taxes imposed by the statute is neither capricious nor arbitrary. *Brown-Forman Co. v. Kentucky,* 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The tax is not unreasonable or discriminatory. *Ohio Oil Co. v. Conway, supra.* The judgment must therefore be affirmed."

The decision in this case is applicable in every particular to the question now before the court and we think that the reasoning therein is sound. After all, however, what the court decided in the North Carolina case, *supra,* is not different from what this court has repeatedly said upon principle as applied to other facts. The principle announced by this court in the case of *Quong Wing vs. Kirkendall, etc.,* 223 U. S. 59, is as decisive of the questions here involved as any case could possibly be following the rule of analogy. The same may be said of the decision of this court in the case of *Metropolis Theatre Co. vs. Chicago,* 228 U. S. 61, and of *Alaska Fish Co. v. Smith,* 255 U. S. 44. The tax is not only valid as a revenue measure based upon the above authorities, but it is valid as an exercise of the police power. When it appears that in 1927 chain stores had developed in the larger cities, Cleveland, Boston, Chicago, Los Angeles, Philadelphia, New York, and several other cities so that more than one-half of all food products sold through retail stores in such cities passed to the consumer through chain stores,—when it appears that such is the fact, we think it must be apparent that that method of

distribution tends toward monopoly. To that extent it must be perfectly apparent that these stores displace individually owned distribution units. This particular method of distribution very apparently does have a definite relation to the public welfare. Even if it should appear that the chain store method of distribution results in cheaper goods to the consumer, that alone would not prove that the system is advantageous to the public welfare when it displaces the individual owner, thus requiring him to seek other means of business activity. There may be a question as to whether the system is economically sound. In fact the evidence shows that economists differ upon the question. Whatever may be said as to the wisdom or unwisdom of the legislation, the fact nevertheless remains that the question as to whether Indiana has acted wisely in seeking to encourage individual ownership of single distribution units as against the chain system, is primarily for the legislature of Indiana and not for the courts.

Cooley on Taxation, (4th Ed.) Section 350;
Quong Wing v. Kirkendall, etc., 223 U. S. 59, at pp. 62-63;
Metropolis Theatre Co. v. Chicago, 228 U. S. 61, at p. 69.

For all practical purposes, what has already been said is equally applicable to the claim that the act in question violates section 23 of Article 1 of the Indiana Constitution. We have cited, however, some Indiana cases in which the above questions were under discussion, at the same time referring to the well settled rule that this court in determining questions arising under the State Constitution

will follow the decisions of the highest court of such state in interpreting its own Constitution.

Douglass v. Noble, 261 U. S. 165, at p. 168.

As to the claim that the Act in question violates section 1 of Article 10 of the Indiana Constitution, the case of *Gafill v. Bracken, Aud.*, 195 Ind. 531, is absolutely decisive of the question in favor of the validity of the law. The above section does not apply to occupation or privilege taxes. As said by the court on page 558:

> "It is first objected that the license fees thus required to be paid constitute a tax on property, and come within the provisions of Article 10, section 1, of the Constitution of Indiana (section 193 Burns 1914), which commands that 'The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation.' In this, counsel are mistaken. A tax on the use of property for certain purposes within this state, or on the sale thereof within this state is not a property tax. The owner may continue to own his gasoline indefinitely without becoming liable for the tax, or he may remove it from the state and sell or use it anywhere else in the world, without such liability. It is not the gasoline which is taxed, but the use of it within the State. And in imposing taxes of this character, the legislative power is untrammeled, except that invidious discrimination will not be permitted."

We insist that Chapter 207 of the Acts of the General Assembly of the State of Indiana enacted at its 1929 session is valid and not open to any constitutional objection.

It is respectfully submitted, therefore, that the cause should be reversed.

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APPENDIX.

CHAPTER 207 OF ACTS OF THE GENERAL ASSEMBLY OF INDIANA OF 1929.

AN ACT requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That from and after the first day of July, 1929, it shall be unlawful for any person, firm, corporation, association or co-partnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state board of tax commissioners, as hereinafter provided.

Sec. 2. Any person, firm, corporation, association or co-partnership desiring to operate, maintain, open or establish a store in this state shall apply to the state board of tax commissioners for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state board of tax commissioners, and shall set forth the name of the owner, manager, trustee,

lessee, receiver or other person desiring such license; the name of such store; the location, including the street number, of each store; and such other facts as the state board of tax commissioners may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 3. As soon as practicable after the receipt of any such application, the state board of tax commissioners shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination, the state board of tax commissioners shall find that any such application is not in proper form and does not contain the necessary and requisite information, it shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid the state board of tax commissioners shall issue to the applicant a license for each store for which application for license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which license is issued.

Sec. 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association, or co-partnership having a license, shall apply to the state board of tax commissioners for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the state board of tax commissioners. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued, and if, by such thirty-first day of January, an application for a renewal license has not been made, the state board of tax commissioners shall notify such delinquent license-holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section 5 of this act.

Sec. 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating or maintaining one or more stores or mercantile establishments, within this state, under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile

establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fees prescribed in sections 2 and 4 of this act.

The license fees herein prescribed shall be as follows:

1. Upon one store, the annual license fee shall be three dollars for each such store;

2. Upon two stores or more, but not to exceed five stores, the annual license fee shall be ten dollars for each such additional store;

3. Upon each store in excess of five, but not to exceed ten, the annual license fee shall be fifteen dollars for each such additional store;

4. Upon each store in excess of ten, but not to exceed twenty, the annual license fee shall be twenty dollars for each such additional store;

5. Upon each store in excess of twenty, the annual license fee shall be twenty-five dollars for each such additional store.

Sec. 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one-half of the full rate, as prescribed in section 5 of this act.

Sec. 7. The provisions of this act shall be construed to apply to every person, firm, corporation,

co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Sec. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained or controlled by the same person, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares, or merchandise of any kind, are sold, either at retail or wholesale.

Sec. 9. Any person, firm, corporation, co-partnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Sec. 10. Any and all expenses incurred by the state board of tax commissioners in the administration of this act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this act, less the expenses incurred in the administration of this act, shall be paid into the state treasury, monthly, by the state board of tax commissioners, and shall be added to and shall

constitute a part of the general fund. Of the funds which shall accrue to the general fund during the fiscal year ending September 30, 1929, under the provisions of this act, the sum of two hundred and fifty thousand dollars shall be transferred to the school relief fund by the auditor of state; and of the funds which accrue to the general fund under the provisions of this act during the fiscal year ending September 30, 1930, the sum of five hundred and fifty thousand dollars, and during the fiscal year ending September 30, 1931, the sum of five hundred thousand dollars, and during each fiscal year thereafter the sum of three hundred thousand dollars shall be transferred to the school relief fund by the auditor of state. The transfer of such amount from the general fund to the school relief fund shall be made on the first day of January, 1930, and on the first day of January of each year thereafter, and no part of the money so transferred shall revert to the general fund at any time. The money so transferred shall be distributed in the same manner as the school relief fund is distributed, as provided by law, except that if any portion of such fund so transferred during any fiscal year is not needed in the regular school relief fund distribution, such excess may be used to apply on deficits existing from preceding years. The term "school relief fund" as used in this section shall be construed to mean that portion of the common school fund set apart by section 3, chapter 201, of the Acts of the General Assembly of 1921 and which is therein designated as a "relief fund."

Sec. 11. The state board of tax commissioners is hereby authorized to employ such clerical assistants as may be necessary to carry out and administer the provisions of this act, and to prepare and print such blanks, forms, reports, receipts and any and all other things which may be necessary to provide for the administration of this act, and to pay any and all such expenses so incurred out of the fund collected under the provisions of this act. The sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated to be available upon the taking effect of this section, and to be used by the state board of tax commissioners in defraying any expenses which may be incurred in the administration and in preparing to administer this act before sufficient funds shall have been collected from license fees, as hereinbefore provided. As soon as a sufficient amount of license fees shall have been collected under the provisions of this act, the two thousand dollars hereby appropriated, or so much thereof as shall have been used, shall be returned to the general fund. Whereas, an emergency exists for the immediate taking effect of this section, the same shall be in full force and effect from and after its passage.

Sec. 12. If any section, provision or clause of this act should be declared invalid, such invalidity shall not be construed to affect the portions of the act not so held invalid.

Sec. 13. This act, except section 11, shall be in effect from and after the first day of July, 1929.

Acts of the General Assembly of Indiana of 1929, page 693.

ARTICLE 1, SECTION 23, INDIANA CONSTITUTION.

The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Burns Annotated Indiana Statutes of 1926, Section 75.

ARTICLE 10, SECTION 1, INDIANA CONSTITUTION.

The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law.

Burns Annotated Indiana Statutes of 1926, Section 200.